WONG SEW YUN & ORS

v.

CHELINGGA ASUH

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
MOHAMED APANDI ALI JCA
MOHTARUDIN BAKI JCA
[CIVIL APPEAL NO: Q-02-1054-2008]
31 MAY 2011

LAND LAW: *Transfer - Validity of - Land inherited by and registered in name of Sarawak native - Land later transferred to non-natives - Whether transfers illegal and invalid - Whether native customary or native area land - Whether land gazetted as Mixed Zone Land and therefore capable of being transferred to non-natives - Sarawak Land Code, ss. 8 & 18*

The respondent, who had inherited and transferred into her name a piece of land ('the land') filed an action against the appellants in the High Court to, *inter alia*, declare the transfer of the land to the first appellant and the transfers thereafter from the first appellant to the second, third, fourth and fifth appellants as illegal and invalid. The High Court allowed the respondent's claim holding that the land was native customary land and therefore could not, by virtue of s. 8 of the Sarawak Land Code, be transferred to non-natives - which all the appellants (excluding the sixth appellant) were. The respondent contended that the land had been gazetted as Mixed Zone Land and was not native customary land or native area land and hence could be transferred to non-natives. At the start of the trial the land had been registered in the name of a company ('the company') but it was not cited as a party to the action. The appellant appealed the High Court's decision to the Court of Appeal.

Held (unanimously allowing the appeal with costs and setting aside the High Court's decision)
Per Mohamed Apandi Ali JCA delivering the judgment of the court:

(1) The land was neither native area land nor native customary land. Being Mixed Zone Land, it could be legally transferred to any non-native. The orders of the High Court were contrary to the findings of fact. (para 8)

(2) There was a serious misdirection in the orders of the High Court for failing to consider or appreciate that prior to the commencement of the trial the land had been registered in the name of a company which was not party to the proceedings or the trial. The orders, in such circumstances, were inappropriate as no notice or opportunity

was ever given to the company for its right to be heard. As the registered owner, the company could not be deprived of its property without a hearing. This was not only trite law but such right was enshrined in arts. 8 and 13 of the Federal Constitution. (para 10)

(3) The High Court's judgment that directed the respondent's name to be registered as proprietor of the land had put the indefeasible title of the company to unnecessary peril. The judgment was unlawful, unenforceable and could not be sustained. (para 12)

Case(s) referred to:
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 8, 13
Land Code (Sarawak), ss. 8, 18

For the appellants - George Lim; M/s Battenberg & Talma
For the respondent - Baru Bian (Siah Sy Jen with him); M/s Baru Bian

[Appeal from High Court, Sibu; Suit No: 21-3-2004]

Reported by Ashok Kumar

JUDGMENT

Mohamed Apandi Ali JCA:

Introduction

[1] In this appeal we shall refer to the appellants and the respondent as the defendant and the plaintiff respectively as they were at the High Court. The plaintiff had filed a writ of summons and statement of claim and seeks the followings orders and relief:

(i) A declaration that the transfer of the said land to the 1st defendant *vide* Instrument No. L1993 / 1989 was illegal and invalid;

(ii) A declaration that the transfer of the said land from the 1st defendant to the 2nd, 3rd, 4th and 5th defendants *vide* Instrument No. L3129 of 1992 was illegal and invalid;

(iii) A declaration that the 1st defendant has no licence to lend monies and the said loan to the plaintiff was illegal and unenforceable in law;

(iv) For a rectification order that the registry book on the said land in the relevant land registry be rectified by the 6th defendant in favour of the plaintiff or her nominee/s;

(v) Such other orders or reliefs that this honourable court deems fit and just;

(vi) Damages to be assessed; and

(vii) Costs.

[2] The action was filed on 6 February 2004; and it was premised on the allegation that the transfer of land described as Lot 1572 Block 201, Sarikei Land District (hereinafter referred to as "the said land") was illegal, unlawful and fraudulent.

[3] Before the commencement of the trial on 5 August 2004, the plaintiff discontinued her action against the 6th defendant. The trial proceeded, without any amendment to the pleadings, by way of witness statements with preliminary cross-examination witness statement and preliminary re-examination, with liberty for further oral cross-examination and re-examination.

[4] At the end of the trial on 30 July 2008 the learned trial judge allowed the plaintiff's claim in part, which in essence declared that the transfer of the said land to the 1st defendant was illegal and invalid; the subsequent transfer of the said property to the 2nd, 3rd, 4th and 5th defendants was illegal and invalid and directed the Registrar of Lands and Survey Sarikei Sarawak to make the necessary amendment in the registry book to give effect to the judgment by putting the plaintiff's name as owner of the said land.

[5] The defendants being not satisfied with the said judgment appealed to this court. We allowed the appeal and set aside the orders made by the High Court. We now give our reasons for doing so.

Issues To Be Determined

[6] Upon perusal of the Appeal Records and after hearing submissions of both parties, we identified the following issues that had became the bones of contention in this appeal:

(a) What is the actual status of the said land? The learned trial judge held that the said land was a Native Customary Land and title was issued under s. 18 of the Sarawak Land Code. As the defendants were all non-native, the learned trial judge held that the first transfer to the 1st defendant and subsequent transfers were illegal and invalid, as they contravened s. 8 of the Sarawak Land Code.

(b) The defendants contended that the said land is a "mixed zone" land and corollary to that: such land cannot be converted into Native Customary land or Native Area Land.

(c) Before the commencement of the trial, the said land is registered under one Nguang Aik (Sarawak) Sdn Bhd. This fact was pleaded by the defendants in para. 8(a) of their statement of defence. This Nguang Aik (Sarawak) Sdn Bhd is not a party to the action in the High Court. The issue is therefore; can an order be made to deprive this registered land owner of his land without giving him the right to be heard?

Our Findings And Decision

[7] Upon perusal of the Appeal Records, we made the followings findings:

(a) The said land was first issued with a title by the Land Registry office on 18 August 1967 (see p. 155 of Appeal Records).

(b) Prior to the issue of the above-said title, the said property is in an areas classified as "Mixed Zone Land" and this classification was made *vide* Gazette Notification GN 27/11 of 3 January 1949 (see copy of gazette at pp. 121-123 of Appeal Records). Furthermore, the Superintendent of the Land and Survey Department, Sarikei Division of Sarawak, Mohamad Razali bin Arshad, in his witness statement (by way of affidavit) avers as follows:

> (3) The land title of a parcel of land is Sarikei, namely, Lot 1572 Block 201 Sarikei Land District (hereinafter called "the said land") is shown to me and annexed as pages 5 – 7 of the Bundle of documents of the 1st – 5th Defendants. I confirm that nowhere does the said land title show that the said land is native land. This means that the said land can be charged to non-natives and non-natives are able to buy the said land and have the said land title registered in their name.
>
> (4) I also confirm that the said land is classified as Mixed Zone Land. A print out of title of the said land is shown to me and annexed as pages 8 – 9 of the Bundle of Documents of the 1st – 5th Defendants. I confirm that the said print out of title was issue by the Land and Survey Department, Sarikei Division. The said print out of title clearly shows that the said land is classified as Mixed Zone Land.
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> (5) A photocopy of the plan of the area that the said land is situate in is shown to me and annexed as Exhibit "WHS-1" in the 5th Defendant's Witness Statement By Way of Affidavit affirmed on 10th March, 2008. The said plan was printed by the Land and Survey department, Sarikei Division on 6th March, 2008 (see bottom left hand corner of the said plan). The said plan shows that the said land was gazetted as Mixed Zone Land *vide* GN 27/11 of 3.1.1949. The said plan also clearly shows that the said area is in an area classified as Mixed Zone Land and not in the

area classified as Native Area Land which is to the south of the plan beyond the boundary line dividing Mixed Zone Land and Native Area Land. A

(6) Upon further search, I found the gazette *vide* GN. 27/11 of 3.1.1949 annexed hereto and marked as exhibit "MRA-1" is a photocopy of the said Gazette. This means that the said land was classified as Mixed Zone Land even before the said land title was issued in 1967 (page 5 of the Bundle of Documents of the 1st - 5th Defendants). B

(c) That the issuance of title under s. 18 of the Sarawak Land Code does not mean that it is a Native Area Land. This can be seen in the explanation given by the Assistant Registrar of the Land and Survey Department, Sarikei Division, Kong Tong Kiong in his witness statement (by way of affidavit), which reads as follows: C

(3) I confirm that a parcel of land in Sarikei, namely, Lot 1572 Block 201 Sarikei Land District (hereinafter called "the said Land") is classified as Mixed Zone Land. A print out of title of the said Land is shown to me and annexed as pages 8 - 9 of the Bundle of Documents of the 1st - 5th Defendants. I confirm that the said print out of title was issued by the Land and Survey Department, Sarikei Division. The said print out of title clearly shows that the said Land is classified as Mixed Zone Land. D E

(4) The land title of the said Land is shown to me and annexed as pages 5 - 7 of the Bundle of Documents of the 1st – 5th Defendants. The said land title was issued pursuant to Section 18 of the Land Code. This means that it was deemed to be grant in perpetuity of that land by Land Code (Amendment) Ordinance, 1974 (see page 6 of the Bundle of Documents of the 1st - 5th Defendants) issued to a native proprietor free of premium, quit rent and other charges for as long as such native proprietor holds it or the land is transferred to the transferee in the line of inheritance. By itself, the issuance of the land title pursuant to Section 18 of the Land Code does not mean that the said Land is Native Area Land. The land title would show whether or not it is a Native Area Land. If it is a Native Area Land, the Restrictions and Special Conditions of the land title on the front page would clearly say so or the category of the land on the back page of the land title next to the diagram of the land would state as follows: "Category: Native Area Land by virtue of Section 2 of the Land Code or gazetted as Native Area Land by Sarawak Government Gazette notification. Country Land". The said land title clearly does not have any such annotations thereon on the front or back pages. The said Land can therefore be: F G H I

(a) charged to non-native and it was charged to non-natives twice in 1980 and both charges were later discharged in 1980 and 1984 respectively (see page 6 of the Bundle of Documents of the 1st - 5th Defendants); and

A (b) sold to non-natives and the said land title can be registered in their name. When the said Land was transferred to the 1st Defendant, the Section 18 clause was cancelled (see item (i) of the Restrictions and Special Conditions on page 5 of the Bundle of Documents of the 1st - 5th Defendants) and the new registered proprietor had to pay quit rent under B Section 18(3) of the Land Code (see page 6 of the Bundle of Documents of the 1st - 5th Defendants).

I confirm that there are many parcels of land in Sarikei and throughout the whole of Sarawak which are like the said Land, the land titles of which were issued pursuant to Section 18 of the C Land Code. I confirm that that in itself does not mean that such lands are Native Area Land. I estimate that the Land and Survey Department, Sarikei Division, has about 10,000 such titles.

A land title is issued under Section 18 of the Land Code to natives who had been using certain land and had claimed native D customary rights over such land but those rights are extinguished upon the issuance of the land title. It is possible to claim native customary rights within Mixed Zone Land and also within Native Area Land. This means that it is possible to have land titles issued under Section 18 of the Land Code for both Mixed Zone Land and Native Area Land, so just because a land title is issued E under Section 18 of the Land Code does not make that land title Native Area Land. It depends on whether the land in the first place is classified and gazetted as Native Area Land. I confirm that the said Land is within the area which is classified as Mixed Zone Land and the issuance of the land title under Section 18 of the Land Code does not change its classification from Mixed F Zone Land to Native Area Land.

(d) That there was no re-classification of the said property since the gazette of 1949, and thus it remained a Mixed Zone Land. This is evidenced in the witness statement (also by way of affidavit) of Yik G Poh Chung, the senior draughtsman of the Land and Survey Department, Sarikei Division, which reads as follows:

I confirm that a parcel of land in Sarikei, namely, Lot 1572 Block 201 Sarikei Land District (hereinafter called "the said land") is classified as Mixed Zone Land. A photocopy of the H plan of the area that the said land is situate in is shown to me and annexed as Exhibit "WSH-1" in the 5th Defendant's Witness Statement By Way of Affidavit affirmed on 10th March, 2008. The said plan was printed by the Land and Survey Department, Sarikei Division on 6th March, 2008 (see bottom left hand corner of the said plan). The said plan shows I that the said land was gazetted as Mixed Zone Land *vide* GN. 27/11 of 3.1.1949. The said plan also clearly shows that

the said land is in an area classified as Mixed Land and not in the area classified as Native Area Land which is to the south of the plan beyond the boundary line dividing Mixed Zone Land and Native Area Land. A

A photocopy of the said Gazette *vide* GN. 27/11 of 3.1.1949 is shown to me and annexed as Exhibit "MRA-1" in MOHAMAD RAZALI BIN ARSHAD's Witness Statement By Way of Affidavit affirmed on 6th May, 2008. This means that the said land was classified as Mixed Zone Land in 1949 whereas the said land title was issued in 1967 (see page 5 of the Bundle of Documents of the 1st – 5th Defendants). So by the time that the said land title was issued, the said land was already classified as Mixed Zone Land and as such, the said land title is not Native Area Land. B C

The third page of the said Exhibit "MRA-1", namely, page 15 of the said Gazette, has a sub-heading, "THIRD DIVISION", and under that are the words "All those blocks of lands shown bordered in blue on a plan lodged in the office of the Superintendent of Lands and Surveys, Third Division, as Miscellaneous Plan No. F3/5-30 numbered 1 to 13". Under that sub-heading and those words is No. 11 which refers to a large tract of land. The description of this large tract of land in No. 11 is by mean and bound following the direction and description given in the said Gazette. This means that we are able to draw a line through the lands to form the border/boundary that is drawn in pink on the said Miscellaneous Plan, a photocopy of which is annexed hereto as Exhibit "YPC-1" so that all the lands enclosed within such border/boundary would be classified as Mixed Zone Land. For the avoidance of doubt, in 1949 at the time of the said Gazette, Sarikei lands were under Third Division. D E F

I am able to tell from the said Miscellaneous Plan that the said Land is within the Mixed Zone Land stated in the said Gazette and I have marked it as "X" in pink on the said Miscellaneous Plan annexed hereto as Exhibit "YPC-1". I confirm that third exhibit is only a portion of the large tract of land described in No. 11 of the said Gazette. I only produce the portion which is relevant to the said Land as the entire Miscellaneous Plan is too big to produce to the Court as it includes lands up to Kapit. G H

When a parcel of land such as the said Land is classified as Mixed Zone Land, the land title which is issued thereafter cannot be classified or categorized as Native Area Land unless there is a further Gazette that says so. In our records, there is no such record that the said Land was re-classified as Native Area Land. So the said land remains as Mixed Land. I

The witness also tendered the Land Classification Map, showing the Mixed Zone Areas that was referred to the 1949 gazette (see p. 126 of Appeal Records).

(e) Under the peculiar land laws of Sarawak, namely the Land Classification Ordinance 1948, land in Sarawak were classified into five categories, namely:

(i) Mixed Zone Land;

(ii) Native Area Land;

(iii) Native Customary Land;

(iv) Reserved Land; and

(v) Interior Land.

Despite the enactment of the Sarawak Land Code in 1958, the classification of the five categories remained unaffected.

(f) The said land was inherited by the plaintiff and transferred into her name on 25 January 1988 and transferred to the 1st defendant, 2nd, 3rd, 4th and 5th defendants in November 1992.

(g) That it is in evidence that the said land was transferred to one Nguong Aik (Sarawak) Sdn Bhd on 16 February 2004 (see the Memorandum of Transfer at pp. 153 - 154 of Appeal Records) and that the said land was charged to Hong Leong Bank Berhad on 18 May 2005.

(h) The actual trial of this action commenced at the High Court on 19 February 2008 and concluded on 30 July 2008.

[8] From the above findings, it is our judgment that the said land is neither a native area land nor a native customary land. Since the basis of declaring the transfers of the said land to the 1st defendant and later to the 2nd, 3rd, 4th and 5th defendants to be illegal and invalid, on the main issue that it is prohibited by the Sarawak Land Code to transfer a native area land or native customary land to a non-native, we conclude that the said orders of the learned trial judge was contrary to our findings of fact. It is our judgment that the said land, being a Mixed Zone Land, can be legally transferred to any non-native.

[9] It must be emphasised that we made our findings based on the unchallenged evidence of the defendants' witness statements, as quoted above. The only half-hearted challenge is on the issue of Mixed Zone Land to be an encumbrance on the land. This to our mind is a misconception as the term "Mixed Zone Land" cannot be an

encumbrance. Such term falls under "categories" of land. In law, it is neither a condition nor an encumbrance. There was no further cross-examination of the witnesses on the facts that the said land remains as Mixed Zone Land.

[10] It is also our judgment that there is a serious misdirection in the orders of the learned trial judge for failing to consider or appreciate that prior to the commencement of the trial, the said land is registered in the name of a person, who is not a party to the proceedings or trial. The orders, in such circumstances are inappropriate as no notice or opportunity was ever given to this person for his right to be heard. It is our judgment that the registered owner, Nguong Aik (Sarawak) Sdn Bhd cannot deprived of his property without a hearing. This is not only trite law but such right is enshrined in arts. 8 and 13 of the Federal Constitution.

[11] *A fortiori*, as held by the Federal Court in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269, the title of a purchaser in due course, for value and without notice is indefeasible.

[12] The High Court judgment, in this case, in particular the last part, that directed the name of the plaintiff to be registered as the proprietor of the said land has put the indefeasible title of Nguong Aik (Sarawak) Sdn Bhd to unnecessary peril. The said judgment is unlawful, unenforceable and cannot be sustained.

[13] For the above reasons, we allowed the appeal by the defendants and accordingly set aside the judgment of the High Court costs was fixed at RM5,000 payable by the respondent (plaintiff) to the appellants (defendants).